

Note

The World Bank and the Internalization of Indigenous Rights Norms

Galit A. Sarfaty

CONTENTS

INTRODUCTION.....	1792
I. HOW THE WORLD BANK SHAPES DOMESTIC LAW	1796
A. <i>Policy Conditionalities</i>	1797
B. <i>Operational Policies</i>	1798
II. OPERATIONALIZING THE BANK’S INDIGENOUS PEOPLES POLICY: A CASE STUDY OF A LOAN TO MOROCCO.....	1801
A. <i>Deciding Who Are Indigenous Peoples</i>	1802
B. <i>Domestic Political and Legal Constraints</i>	1804
C. <i>Civil Society Activism</i>	1806
III. INDIGENOUS RIGHTS NORM COMPLIANCE	1809
A. <i>Rethinking the Dynamics of Norm Emergence and Internalization</i>	1809
B. <i>A Two-Pronged Strategy for Norm Internalization</i>	1812
CONCLUSION	1817

INTRODUCTION

International organizations, particularly international financial institutions, are becoming central players in promoting compliance with human rights norms and the adoption of social and environmental standards. The policymaking of the World Bank exemplifies this trend. By adopting operational policies on issues like indigenous peoples, involuntary resettlement, and environmental assessment, the World Bank has emerged as an important actor in the interpretive community for public international law.¹

World Bank operational policies are becoming de facto global standards among other development banks as well as institutions engaged in project finance. For example, they serve as a model for the Equator Principles, a set of voluntary social and environmental guidelines that have been adopted by at least twenty-nine private banks.² Export credit agencies (ECAs) are another type of economic actor applying Bank policies on environmental and social issues, largely in response to outside pressure.³ In 2000, a group of more than 300 nongovernmental organizations (NGOs) signed the Jakarta Declaration for Reform of Official Export Credit and Investment Insurance Agencies, which includes a call for “[b]inding common environmental and social guidelines and standards [that are] no lower and less rigorous than existing international procedures and standards for public international finance such as those of the World Bank Group.”⁴ Although

1. Interpretive communities are groups that “establish their own meanings . . . through their constant struggle to define and maintain the independence and authority of their *nomos*,” or normative universe of rules and principles of justice. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 25 (1983). They possess a degree of norm-generating autonomy, which allows them to “interpret the terms of the[ir] association’s own being.” *Id.* at 32.

2. The Equator Principles are modeled on the social and environmental standards of the International Finance Corporation (IFC), the private-sector arm of the World Bank. They were originally conceived in October 2002 when the IFC invited a group of major private banks to discuss an environmental and social risk-assessment framework for the projects that they finance that are over fifty million dollars in size. These projects often include oil and gas pipelines and hydroelectric dams, which are particularly prone to causing environmental and social disruption. The Equator Principles’ preamble states, “We will not provide loans directly to projects where the borrower will not or is unable to comply with our environmental and social policies and processes.” THE “EQUATOR PRINCIPLES”: AN INDUSTRY APPROACH FOR FINANCIAL INSTITUTIONS IN DETERMINING, ASSESSING AND MANAGING ENVIRONMENTAL & SOCIAL RISK IN PROJECT FINANCING, at pmbl. (2003), available at http://www.equator-principles.com/documents/Equator_Principles.pdf; see also Tom Nelthorpe, *Principled Finance?*, PROJECT FIN., June 2003, at 20, 20.

3. ECAs are public agencies, like the Export-Import Bank of the United States and the U.S. Overseas Private Investment Corporation, that provide government-backed financing to corporations from their home countries to conduct business abroad, particularly in developing countries.

4. ECA Watch, Jakarta Declaration for Reform of Official Export Credit and Investment Insurance Agencies, <http://www.eca-watch.org/goals/jakartadec.html> (last visited Apr. 28, 2005). Since the signing of the Jakarta Declaration, member governments of the Organization for Economic Cooperation and Development (OECD) Working Party on Export Credits and Credit

the Bank has faced protests over controversial projects,⁵ NGOs nonetheless consider its standards “a minimum floor that any environmentally and socially sensitive project should meet.”⁶ Given the adoption of Bank guidelines by various economic institutions, it is important to understand the process by which these standards shape the policies of borrower countries and influence the interactions among a range of actors, from government officials and Bank staff to civil society activists.

Transnational legal process, one of the leading theoretical approaches to international law, can help explain the increasing importance of nonstate actors like the World Bank in enforcing international norms such as human rights.⁷ According to the traditional form of the theory, international norms penetrate domestic legal systems through norm internalization. Nonstate actors, including individuals and institutions like the Bank and NGOs, cooperate with state actors to internalize international norms into domestic law. A study exclusively of government-to-government interactions would thus overlook a crucial way in which domestic law is shaped.

The conventional version of this theory, however, fails to account for the internal dynamics of the transnational legal process as applied to international institutions like the World Bank. This Note demonstrates that the processes of norm emergence and internalization are more nuanced than has been suggested in contemporary normative theories.⁸ Understanding

Guarantees have drafted a common set of environmental guidelines. The guidelines urge members undertaking environmental reviews to “benchmark projects . . . against the safeguard policies published by the World Bank Group,” particularly the policies on involuntary resettlement, indigenous peoples, and cultural property. OECD Working Party on Export Credits and Credit Guarantees, *Updated Recommendation on Common Approaches on Environment and Officially Supported Export Credits*, ¶ 12.1 & n.2, TD/ECG(2005)3 (Feb. 25, 2005), available at [http://webdomino1.oecd.org/olis/2005doc.nsf/Linkto/td-ecg\(2005\)3](http://webdomino1.oecd.org/olis/2005doc.nsf/Linkto/td-ecg(2005)3).

5. These include the Planaflores project in Brazil; the Narmada Dam in India; and the Three Gorges Dam in China, which was canceled due to intense outside pressure. Jonathan A. Fox & L. David Brown, *Assessing the Impact of NGO Advocacy Campaigns on World Bank Projects and Policies*, in *THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS* 485, 500-03 (Jonathan A. Fox & L. David Brown eds., 1998).

6. Press Release, Friends of the Earth et al., Memorandum on Camisea Project Violations of World Bank Safeguard Policies (Oct. 17, 2002), available at http://www.bicusa.org/bicusa/issues/misc_resources/338.php.

7. Transnational legal process is “the theory and practice of how public and private actors—nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.” Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183-84 (1996); see also Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998) [hereinafter Koh, *Bringing International Law Home*]; Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. “War on Terrorism,”* 5 THEORETICAL INQUIRIES L. 47 (2004); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (review essay) [hereinafter Koh, *Why Obey?*].

8. Existing scholarship in political science discusses the role of international actors in facilitating norm internalization in states. See, e.g., MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*,

these processes requires not simply an examination of the Bank's written policies but, more importantly, an analysis of the internal deliberations within the institution over how to interpret and implement those policies. I argue that a number of factors shape the Bank's influence over human rights norm compliance in borrower countries. These factors can constrain or facilitate norm internalization.

The Bank's effectiveness in bringing about the internalization of indigenous rights norms in borrower countries depends on both external factors (domestic legal and political constraints and the level of civil society resistance) and internal ones (power relations within the institution). Domestic constraints exist in countries with inadequate legal frameworks for recognizing indigenous rights. In the face of these constraints, the institutional culture of the Bank is often divided on whether to apply the Bank's policy on indigenous peoples. Civil society activists may then exploit internal tensions and forge alliances with advocates within the Bank who are pushing for policy compliance. As a result, minority voices within the institution, often including non-economist social scientists, can exert greater influence on how indigenous-peoples-related issues are addressed in development projects. Studying how tensions are resolved and what factors lead staff to apply or not apply the Bank's indigenous peoples policy requires an analysis of the organizational culture of the Bank and how the institution (acting as a single unit) interacts with outside actors. A revised version of transnational legal process theory must account for these external and internal factors.

When studying the relationship between state and nonstate actors, one must recognize that all actors—including international institutions like the Bank—are diverse and may be rife with internal conflict. Most studies of the Bank have overlooked the internal divisions between departments and between individuals, instead treating it as a monolithic institution.⁹ My analysis of one aspect of the Bank—its approach to indigenous peoples, who are among the most disadvantaged and marginalized populations in many areas of the world and are particularly vulnerable to changes caused by development projects—helps uncover internal disagreements. In projects affecting indigenous peoples, Bank staff must balance competing interests in deciding whether and when to apply the indigenous peoples policy and how to implement the policy once it is applied. As a result, actions are

52 INT'L ORG. 887 (1998); Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 1 (Thomas Risse et al. eds., 1999). But this literature fails to describe how states can socialize international actors to neglect or even violate the actors' own norms.

9. See, e.g., 50 YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND (Kevin Danaher ed., 1994); 1-3 IBRAHIM F.I. SHIHATA, *THE WORLD BANK IN A CHANGING WORLD* (1991, 1995, 2000); SIGRUN I. SKOGLY, *THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND INTERNATIONAL MONETARY FUND* (2001).

continuously contested and renegotiated within the institution itself. These internal contestations often correspond to divisions between competing interest groups and are most pronounced in regard to countries where domestic legal systems do not recognize indigenous peoples or sufficiently address indigenous-peoples-related issues. For example, economists may disagree with environmentalists and anthropologists over whether to apply the indigenous peoples policy in a borrower country where there are no legal provisions that recognize special rights for indigenous peoples.

The Bank's approach to indigenous rights is, therefore, a useful lens for understanding the institution's role in the transnational legal process, where international norms seep into domestic law, often in the face of competing national self-interest. The dynamics of this process shed light on how the Bank balances its mandate of poverty reduction with human-rights-related concerns. They also have implications for the role of international institutions in the transnational legal process. In rethinking this theory, I offer a more nuanced model of norm emergence and internalization that takes account of the experience of the Bank with respect to indigenous rights. I acknowledge that my argument assumes that the Bank should be involved in the promotion of human rights in general and indigenous rights in particular. While there are counterarguments in favor of an exclusively economic focus for the Bank, a discussion of that debate is beyond the scope of this Note.

This Note proceeds in three Parts. Part I demonstrates how the World Bank shapes the domestic law of borrower countries. I examine the Bank's exercise of legal authority over countries through two mechanisms, attaching policy conditionalities to loans and incorporating its operational policies into loan agreements, both of which enable international norms to penetrate domestic legal systems.

Part II traces the Bank's involvement in indigenous rights and presents a case study of a Bank loan proposed for Morocco in the early 1990s. Through this case study, I highlight the domestic political and legal constraints Bank staff sometimes face when operationalizing the indigenous peoples policy, as well as the role of civil society activists in influencing how the Bank overcomes these constraints.

The experience of the Bank with respect to indigenous rights offers lessons for how to rethink transnational legal process theory. In Part III, I analyze the processes of norm emergence and internalization from the vantage point of one institution and its internal and external relations. I then turn to a prescriptive account of how to achieve internalization of indigenous rights norms in the Bank and in borrower countries. The Conclusion suggests possible implications of this analysis for the anthropology of international institutions more generally.

I. HOW THE WORLD BANK SHAPES DOMESTIC LAW

The World Bank has emerged as an important actor in the international law community since its founding in 1944. It exercises political and economic leverage over countries through loan and credit agreements, which are binding under the international law of treaties.¹⁰ Because it conditions these agreements on compliance with its operational standards, it can incorporate specific policy and institutional reforms into domestic legal systems. By exerting control over the policies of borrower countries, the Bank can play a vital role in the internalization and domestic enforcement of international law.

As an international organization, the Bank is more than just a collection of individual member states; it also serves as a governance institution with its own international legal personality. Its status as a legal person means it can both execute and be subject to international responsibilities and obligations, possibly including obligations incumbent on it under international agreements and customary international law.¹¹ The Bank possesses a range of powers necessary to discharge its functions and fulfill its purposes, particularly poverty alleviation and economic development. Its Articles of Agreement provide that it "shall possess full juridical personality, and, in particular, the capacity: (i) to contract; (ii) to acquire and dispose of immovable and movable property; [and] (iii) to institute legal proceedings."¹² Most importantly, it has the capacity to enter into loan and credit agreements.¹³ The Bank and borrower countries have a responsibility to carry out these legally binding agreements.

In order to understand the nature of the Bank's legal authority over countries, I describe two mechanisms by which the Bank influences the behavior and policies of borrower countries: policy conditionalities and operational standards.

10. Laurence Boisson de Chazournes, *Policy Guidance and Compliance: The World Bank Operational Standards*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 281, 282 (Dinah Shelton ed., 2000).

11. While the scope of the Bank's obligations under international law is an unresolved question, legal scholars and advocates have increasingly argued that the institution is subject to international treaties, regardless of whether a borrower country has signed on to those treaties. See, e.g., Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 47 (1996); Gunther Handl, *The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development*, 92 AM. J. INT'L L. 642 (1998); Fergus MacKay, *Universal Rights or a Universe unto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, 17 AM. U. INT'L L. REV. 527 (2002).

12. Articles of Agreement of the International Bank for Reconstruction and Development, art. VII, § 2, July 22, 1944, 60 Stat. 1440, 1457 (1945), 2 U.N.T.S. 134, 180 (1947) [hereinafter Articles of Agreement].

13. C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 102 (1996).

A. Policy Conditionalities

While the Bank may exercise its influence informally through the use of oral commitments, supplemental letters, solicited and unsolicited advice, and letters of intent,¹⁴ loan agreements are the primary mechanism through which it shapes domestic law. The Bank attaches conditionalities to loan agreements for policy-based lending.¹⁵ A policy conditionality is “a set of requirements and preconditions that the recipient country is expected to meet in order to receive financial assistance.”¹⁶ According to the Articles of Agreement, such preconditions “ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.”¹⁷ If the country fails to meet these conditionalities, the Bank has the right to stop disbursing funds.

For instance, the Bank has conditioned loan disbursement for hydroelectric projects on the recipient country’s reducing government energy subsidies and decreasing the role of the government in energy production.¹⁸ In addition to these economic policy reforms, Bank loans for hydroelectric projects have also required that the country address relocation and environmental concerns. Satisfactory implementation of these conditions has been a precondition for additional loan disbursements.

Policy conditionalities have generated substantial debate in the development community, both inside and outside the Bank, over their effectiveness in generating proposed reforms and supporting country ownership. They are sometimes considered intrusions on a country’s sovereignty, especially when the borrower country is under great financial pressure to accept a loan. In its 1992 Wapenhans Report, the Bank’s Operations Evaluation Department acknowledged the one-sidedness of

14. EDWARD S. MASON & ROBERT E. ASHER, *THE WORLD BANK SINCE BRETTON WOODS* 420 (1973).

15. The Bank has two basic types of lending instruments: investment loans and development policy loans (formerly known as adjustment loans). Investment loans have a long-term focus (five to ten years) and finance goods, works, and services in support of economic and social development projects in a broad range of sectors. Development policy (or policy-based) loans have a short-term focus (one to three years) and provide quickly disbursed external financing to support policy and institutional reforms. Conditionalities are more commonly used in policy-based lending. WORLD BANK, *A GUIDE TO THE WORLD BANK* 47-49 (2003); 1 WORLD BANK, *THE WORLD BANK OPERATIONAL MANUAL*, at OP 8.60 (2004), <http://wbIn0018.worldbank.org/Institutional/Manuals/OpManual.nsf> [hereinafter OPERATIONAL MANUAL] (Development Policy Lending).

16. OPERATIONS POLICY & COUNTRY SERVS., WORLD BANK, *REVIEW OF WORLD BANK CONDITIONALITY: ISSUES NOTE 4* (2005).

17. Articles of Agreement, *supra* note 12, art. III, § 5(b), 60 Stat. at 1444, 2 U.N.T.S. at 146.

18. Jonathan Cahn, *Challenging the New Imperial Authority: The World Bank and the Democratization of Development*, 6 HARV. HUM. RTS. J. 159, 167 (1993).

negotiations between the Bank and borrower countries.¹⁹ According to the report, borrowers complained that “[d]uring negotiations, the Bank overpowers borrowers—and the country negotiating team often doesn’t have the strength to resist.”²⁰

Critics also contend that conditionalities may not directly relate to the success of the project or the repayment of the loan. Instead, they may be extensions of the Bank’s development ideology and its vision of the country’s long-term economic future. Studies have shown that there is a positive relationship between policy-based loan success rates and a country’s economic track record.²¹ As a result, there have been proposals to replace *ex ante* commitments with results-oriented approaches where aid would be allocated only to countries with favorable policy environments.²²

B. Operational Policies

In addition to imposing policy conditionalities on borrower countries, the Bank also influences domestic policymaking through its operational policies. These policies, approved by the Bank’s Board of Executive Directors, guide staff practice and ensure that operations are financially, socially, and environmentally sound. They provide explicit requirements for the design, appraisal, and implementation of Bank-financed development projects. While operational policies are mandatory for Bank staff, other standards, such as Bank procedures and good practices, are merely recommended.²³ Of particular importance are the so-called safeguard policies designed to avoid or mitigate detrimental impacts of Bank activities

19. PORTFOLIO MGMT. TASK FORCE, WORLD BANK, EFFECTIVE IMPLEMENTATION: KEY TO DEVELOPMENT IMPACT (Discussion Draft 1992) [hereinafter WAPENHANS REPORT].

20. *Id.* Annex B, at 3.

21. See, e.g., Craig Burnside & David Dollar, *Aid, Policies, and Growth*, 90 AM. ECON. REV. 847 (2000). For a review of the debates over policy conditionalities, see OPERATIONS POLICY & COUNTRY SERVS., *supra* note 16; and Stefan G. Koeberle, *Should Policy-Based Lending Still Involve Conditionality?*, 18 WORLD BANK RES. OBSERVER 249 (2003).

22. An example of a performance-based lending program is the Millennium Challenge Account, a recently created U.S. foreign aid program to provide money to countries with sound policies, based on sixteen performance indicators. See Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. D, tit. VI, 2004 U.S.C.A.N. (118 Stat.) 3, 211-26 (to be codified at 22 U.S.C. §§ 7701-7718) (Millennium Challenge Act of 2003).

23. The distinction between mandatory and recommended standards is important for the applicability of complaint procedures. Only mandatory operational policies fall within the jurisdiction of the World Bank Inspection Panel, a quasi-independent forum created in 1993 for local citizens to file complaints against the Bank for failure to follow its own policies. See Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT’L L. 553, 576-79 (1994); Benedict Kingsbury, *Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples, in THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNIE* 323, 330-32 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999).

on certain groups of people (e.g., indigenous peoples) and on the environment (e.g., natural habitats).²⁴

While the primary purpose of operational policies is to guide staff in their activities, the Bank often incorporates provisions from its policies into its loan and credit agreements. For instance, as part of its loan agreement, a borrower country may be required to adopt and implement a resettlement action plan designed in accordance with the Bank's operational policy on involuntary resettlement.²⁵ As mentioned earlier, the Bank's loan and credit agreements are legally binding treaties that are part of international law. By conditioning loans on compliance with operational policies, the Bank plays a crucial role in affecting the behavior and institutional framework of borrower countries. A country's breach of a loan agreement gives the Bank reason to suspend disbursements, although such a threat rarely materializes. Instead, the Bank may limit its involvement in future projects in the country for fear of further noncompliance with Bank policies.²⁶ Bank staff members who fail to enforce the standards are subject to investigation by the Bank's Inspection Panel.²⁷

The Bank can extend its influence over borrower countries by promoting compliance with other types of international law as part of its operational policies.²⁸ Its operational policies on environmental assessment and forests, for example, mandate that a "project [be] consistent with domestic law and that it . . . not contravene any international [environmental] treaties to which the borrower country is a party."²⁹ When

24. There are ten safeguard policies on a range of topics: cultural property, environmental assessment, forests, indigenous peoples, involuntary resettlement, natural habitats, pest management, projects in disputed areas, projects on international waterways, and safety of dams. 2 OPERATIONAL MANUAL, *supra* note 15 (Project Requirements). With the approval of pilot operations for a new country systems approach, designed to increase country ownership and facilitate harmonization among development agencies, the Bank may be starting to slowly shift away from applying safeguard policies. Under the country systems approach, when a country's environmental and social safeguard systems are deemed "equivalent" to Bank standards, the Bank will apply national systems rather than its own safeguard policies for project preparation and implementation. OPERATIONS POLICY & COUNTRY SERVS., WORLD BANK, ISSUES IN USING COUNTRY SYSTEMS IN BANK OPERATIONS 9-10 (2004).

25. Compliance with the Bank's policy on involuntary resettlement would thus be a policy conditionality attached to the loan. See 2 OPERATIONAL MANUAL, *supra* note 15, OP 4.12 (Involuntary Resettlement).

26. Kingsbury, *supra* note 23, at 338-39.

27. See *supra* note 23.

28. Boisson de Chazournes, *supra* note 10, at 282.

29. *Id.* at 287; see 2 OPERATIONAL MANUAL, *supra* note 15, OP 4.01 (Environmental Assessment); 2 *id.* OP 4.36 (Forests). In consultations over the Bank's revision of its indigenous peoples policy, many NGOs and indigenous peoples have called on the Bank to incorporate similar language into the policy that would "prohibit funding of projects or programmes that risk contravening the borrowers' international obligations on human rights and the environment." Bank Information Ctr., Indigenous Delegates' Statement to the World Bank at the Indigenous Peoples Roundtable (Oct. 17-18, 2002) (unpublished document), http://www.bicusa.org/bicusa/issues/misc_resources/541.php; see also Forest Peoples Programme, Critique by the Forest Peoples Programme of the World Bank's December 2004 Draft Revised Policy on Indigenous

international standards are higher than those contained in national law, the Bank's mandatory policies call for application of the former. The Bank's policy on disclosure of information³⁰ also follows international standards on access to information, public awareness, and participation in decisionmaking.³¹ Likewise, its cultural property policy, currently under revision, makes explicit reference to country obligations under international treaties, such as the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage.³² In addition, its operational policy on pest management sets minimum standards in accordance with international guidelines issued by the U.N. Food and Agriculture Organization (FAO).³³ Even when not explicitly referred to, international instruments are often considered for interpretive purposes in implementing best practices.³⁴

Moreover, operational policies and procedures may themselves acquire the status of customary norms by serving as models for national legislation and for the policies of other multilateral development banks. The formation of customary rules of international law arises out of general practice by states accompanied by an acceptance of the practice as law—what is called the *opinio juris*.³⁵ The legal legitimacy of custom rests on the international community's adoption of custom formation as an appropriate method of rule creation.³⁶

In the case of the World Bank, its operational policies may become "guidelines for other investors, including both bilateral aid agencies and private sector lenders, some of whom are anxious to reduce risk and secure an imprimatur from a high-status body with expert project personnel such as the World Bank."³⁷ The Bank's policy on environmental assessment, first introduced in 1989, is a notable example.³⁸ It inspired similar guidelines at the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, several bilateral

Peoples (OP 4.10) (Dec. 23, 2004) (unpublished document), http://www.forestpeoples.org/Briefings/World%20Bank/wb_ip_dft_pol_4_10_dec04_eng.htm.

30. WORLD BANK, THE WORLD BANK POLICY ON DISCLOSURE OF INFORMATION (2002).

31. See Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517 (1999).

32. See 2 OPERATIONAL MANUAL, *supra* note 15, OPN 11.03 (Management of Cultural Property in Bank-Financed Projects) (mentioning the U.N. definition of cultural heritage, expressed in the 1972 Convention); Boisson de Chazournes, *supra* note 10, at 298; see also Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151. The revised OP 4.11, which will replace OPN 11.03, is under preparation.

33. 2 OPERATIONAL MANUAL, *supra* note 15, OP 4.09, ¶ 7 n.7 (Pest Management) ("The FAO's *Guidelines for Packaging and Storage of Pesticides* (Rome, 1985), *Guidelines on Good Labeling Practice for Pesticides* (Rome, 1985), and *Guidelines for the Disposal of Waste Pesticide and Pesticide Containers on the Farm* (Rome, 1985) are used as minimum standards.").

34. Boisson de Chazournes, *supra* note 10, at 299.

35. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 238 (1980).

36. *Id.* at 244.

37. Kingsbury, *supra* note 23, at 339.

38. 2 OPERATIONAL MANUAL, *supra* note 15, OP 4.01 (Environmental Assessment).

donors, and various private-sector firms.³⁹ In addition, the Rio Declaration, drafted at the 1992 U.N. Conference on Environment and Development, mandates that an environmental impact assessment requirement be incorporated into national legislation and regulations.⁴⁰ This cross-fertilization of international and Bank standards highlights the prominent role that Bank operational policies play in the development of customary international law norms.⁴¹

II. OPERATIONALIZING THE BANK'S INDIGENOUS PEOPLES POLICY: A CASE STUDY OF A LOAN TO MOROCCO

Among the various areas in which the Bank has shaped domestic law, one of the most overlooked is indigenous peoples' rights. Given its day-to-day experience carrying out development projects that directly or indirectly affect indigenous peoples, the Bank has become a critical international player in the formulation of indigenous rights norms. Its projects have the potential to have a significant impact on the social and economic welfare of these peoples. Therefore, how the Bank approaches indigenous rights can have serious consequences.

The Bank entered the dialogue over indigenous rights norms in 1982, when it became the first multilateral financial institution to introduce a special policy on indigenous peoples, Operational Manual Statement 2.34. In 1991, it issued a revised policy statement, Operational Directive (OD) 4.20.⁴² OD 4.20 applies to all Bank-financed projects identified as affecting indigenous peoples. It requires a "culturally appropriate" development plan "based on the informed participation" of the peoples themselves.⁴³ It aims

39. Kingsbury, *supra* note 23, at 339.

40. U.N. Conference on Env't & Dev., June 3-14, 1992, *Rio Declaration on Environment and Development*, princ. 17, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1) (June 13, 1992) ("Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.").

41. See Boisson de Chazournes, *supra* note 10, at 300. Cross-fertilization also occurs in the opposite direction, whereby the World Bank revises its policies to keep up with developments in organizations like the United Nations and the International Labour Organization. See, e.g., Kingsbury, *supra* note 23, at 341.

42. 2 OPERATIONAL MANUAL, *supra* note 15, OD 4.20 (Indigenous Peoples). In 1998, the Bank began to revise OD 4.20 into a new policy, Operational Policy (OP) 4.10. World Bank, Draft OP 4.10, <http://lnweb18.worldbank.org/ESSD/sdvext.nsf/63ByDocName/PoliciesRevisedDraftOperationalPolicyonIndigenousPeoplesRevisedDraftOP410> (last edited Dec. 1, 2004). The Bank conducted public consultations over a revised draft policy from December 2004 until February 2005. Its Board of Executive Directors will soon consider the policy for approval. If approved, OP 4.10 will replace the existing Bank policy, OD 4.20. The Bank also plans to release a corresponding draft Bank Procedures (BP) 4.10 and an implementation guide and sourcebook. World Bank Group, Indigenous Peoples, <http://lnweb18.worldbank.org/ESSD/sdvext.nsf/63ByDocName/IndigenousPeoples> (last visited Apr. 28, 2005).

43. 2 OPERATIONAL MANUAL, *supra* note 15, OD 4.20, ¶¶ 8, 14(a) (emphasis omitted) (Indigenous Peoples).

to ensure that “the development process fosters full respect for the[] dignity, human rights, and cultural uniqueness” of indigenous peoples.⁴⁴

Yet the Bank’s institutional practices regarding indigenous peoples diverge from its written policy. A 2003 report by the Bank’s Operations Evaluation Department (OED), an independent unit within the Bank that reports directly to its Board of Executive Directors, found that only 55 of the 89 projects (or about 62% of the projects) that could have potentially affected indigenous peoples (as determined by the OED’s application of the policy’s stated criteria) actually applied OD 4.20.⁴⁵ Of the 55 projects that applied the policy, only 32 (or 58% of the 55) were assessed to have done so in a satisfactory or highly satisfactory way.⁴⁶

There is a disjuncture between the Bank’s articulation of its indigenous peoples policy and its day-to-day application.⁴⁷ Bridging this gap requires an analysis of the Bank’s difficulties in operationalizing the policy. In order to illustrate these practical constraints, I present a case study of a loan to Morocco that the Bank planned in the early 1990s. After describing the circumstances surrounding the loan, I discuss domestic political and legal constraints that likely discouraged some Bank staff from applying the policy. Finally, I describe the role of civil society activists in exploiting tensions within the Bank and thereby promoting policy implementation.

A. *Deciding Who Are Indigenous Peoples*

When attempting to operationalize the indigenous peoples policy, Bank employees are often influenced by a country’s political stance with respect to indigenous peoples. For example, there are some countries, like

44. 2 *id.* ¶ 6.

45. OPERATIONS EVALUATION DEP’T, WORLD BANK, REPORT NO. 25,332, IMPLEMENTATION OF OPERATIONAL DIRECTIVE 4.20 ON INDIGENOUS PEOPLES: AN INDEPENDENT DESK REVIEW ¶ 3.4 (2003) [hereinafter OED DESK REVIEW]. The OED examined all 234 projects that were appraised after 1992, when OD 4.20 came into effect, and closed before May 2001. *Id.* ¶ 3.1. When determining whether the operational directive had been applied to projects, it looked for projects with an indigenous peoples development plan or with elements of an indigenous peoples plan, “namely: sound diagnosis of issues related to IP [indigenous peoples], participation of IP in project design and implementation, measures to protect the interests of IP, and monitoring indicators for IP-related results.” *Id.* ¶ 1.13. The OED also considered projects that lacked these elements to varying degrees but included other measures to protect indigenous peoples. *Id.* It should be noted, however, that the OED found marked improvement in the degree and quality of policy implementation in projects approved after 1998, when the Bank began to devote more attention to safeguard policies. *Id.* attachment 1, ¶ 7.

46. *Id.* ¶ 3.12. The OED rated projects as applying the policy in a satisfactory or highly satisfactory way if they included a sound diagnosis of issues related to indigenous peoples, participation of indigenous peoples in design and implementation, and measures to protect the interests of indigenous peoples. Projects that lacked a sound diagnosis of issues were rated moderately satisfactory, while those with lower levels of participation or no participation were rated moderately unsatisfactory or unsatisfactory. *Id.* at 17 tbl.3.3.

47. See generally Kingsbury, *supra* note 23, at 338-39 (discussing the indigenous peoples policy and the processes of policy adoption, application, and supervision within the Bank).

Morocco, whose governments do not recognize ethnic minorities within their borders as indigenous or provide only limited rights for these minorities in their legal systems. Approving a loan in these countries becomes more problematic when there are disagreements within the Bank about whether these peoples are in fact indigenous and thus require special protections that countries do not want to institute.

When a country contests the Bank's recognition of an ethnic group as indigenous, the Bank faces two undesirable options: (1) canceling the loan on the ground that the country is refusing to comply with the indigenous peoples policy or (2) proceeding with the loan without implementing the special provisions required by the policy, thereby conceding the country's position that there are no indigenous peoples within its borders. This dilemma is exacerbated when the country is in dire need of funding due to high poverty rates. Should the Bank's poverty-reduction strategy supersede its indigenous rights strategy?

Bank employees faced this situation when they considered a proposed loan to Morocco called the Second Agricultural Sector Investment Loan, which had the potential to adversely affect Morocco's Berber population. The project would finance countrywide interventions on forest land, support the revision of laws that limit the Berber communities' rights to benefit from forest resources, and facilitate the granting of land titles in land reform areas.⁴⁸ Because the Berber people inhabit these forest areas, the question of whether to consider them indigenous was crucial.

The answer to this question was contested within the Bank, partly as a result of a lack of clarity in the policy itself. The Bank's indigenous peoples policy states that "[b]ecause of the varied and changing contexts in which indigenous peoples are found, no single definition can capture their diversity."⁴⁹ It identifies a group as indigenous according to

the presence in varying degrees of the following characteristics:

(a) a close attachment to ancestral territories and to the natural resources in these areas;

(b) self-identification and identification by others as members of a distinct cultural group;

(c) an indigenous language, often different from the national language;

(d) presence of customary social and political institutions; and

48. OED DESK REVIEW, *supra* note 45, at 13 box 3.1.

49. 2 OPERATIONAL MANUAL, *supra* note 15, OD 4.20, ¶ 5 (Indigenous Peoples).

(e) primarily subsistence-oriented production.⁵⁰

There is no particular formula for the relative importance of each criterion. While national constitutions and relevant legislation provide “a preliminary basis,” identification ultimately relies on the judgment of Bank staff with regional technical expertise.⁵¹ Due to the diversity of perspectives within the Bank—along disciplinary and geographic lines, among others—many views need to be reconciled or rejected before the Bank can reach a final decision.

In the case of the loan to Morocco, Bank managers ultimately decided not to recognize the Berbers as indigenous and, therefore, not to apply the indigenous peoples policy.⁵² The Second Agricultural Sector Investment Loan was approved on June 23, 1994. In an OED report, management explained its decision not to apply the policy to the Berbers: “Taking into account the social, cultural, and political context, [Bank staff] therefore determined that the OD did not apply.”⁵³ However, an independent desk review of this loan conducted by the OED and fortified by the views of an expert panel concluded that the Berbers meet the criteria for indigenous peoples listed in OD 4.20.⁵⁴

Why did some Bank managers disagree with the OED and ultimately decide not to apply OD 4.20 to the Berbers? And why did certain Bank staff who felt that the policy should not be applied to the Berbers win out over those who felt that it should be applied? I answer the first question by describing the domestic political and legal constraints that shape Bank decisionmaking. I respond to the second by illustrating the importance of civil society activists who form alliances with interest groups within the Bank.

B. *Domestic Political and Legal Constraints*

Morocco’s legal and political situation likely influenced Bank staff judgment about whether to label the Berbers as an indigenous people. There is little consensus in Morocco on whether social groups like the Berbers are indigenous.⁵⁵ The legal system does not recognize the Berbers as indigenous, so the very use of the term “indigenous” was controversial for the Moroccan government. Government officials may have feared that the Bank’s application of the policy would signal the government’s implicit

50. 2 *id.*

51. 2 *id.* ¶ 4, ¶¶ 4-5.

52. OED DESK REVIEW, *supra* note 45, at 13 box 3.1.

53. *Id.*

54. *Id.*

55. *Id.* ¶ 4.3.

recognition of the Berbers as indigenous, possibly leading to internal ethnic tension or causing the Berbers to mobilize politically for additional rights.⁵⁶

Determining who is indigenous is sensitive in many countries, especially in African and Asian countries whose governments often assert that all inhabitants are equally "indigenous."⁵⁷ Countries' definitions of who is indigenous, or their lack of recognition of any indigenous peoples within their borders, sometimes contrast with the classifications made by Bank staff. Because these countries may have ethnic, possibly indigenous populations intermixed with other disadvantaged and poor peoples, some Bank staff have argued that application of the indigenous peoples policy threatens to create rifts between the indigenous and nonindigenous poor. If the Bank persisted in pressuring a borrower country to apply the policy, it might risk upsetting government officials and thereby hindering future negotiations between that country and the Bank.

For example, the application of OD 4.20 to a project in India raised concerns among Indian government officials who feared it had the potential to create tensions among poor ethnic groups.⁵⁸ India's Second Water Supply and Environmental Sanitation Project in Karnataka, approved in 2001, affected the Lambanis and the Siddis, ethnic groups with distinctive cultural practices who are marginalized and severely disadvantaged and who could arguably qualify as indigenous peoples under OD 4.20. But from the Indian government's point of view, the Lambanis' and the Siddis' "attachment to ancestral lands is not greater than that of other poor social groups. . . . [, and thus] it is unclear why they need to be protected under a special policy when other poor groups that have lived on those lands for much longer do not enjoy such privileges."⁵⁹ As a result, government officials protested against the application of OD 4.20 and claimed that "such arbitrary classifications could cause social tensions."⁶⁰

The circumstances surrounding the loan to Morocco parallel those in India and suggest that domestic political factors played a substantial role in internal Bank decisionmaking. Other loans in politically contentious regions

56. Many countries, such as Morocco, find it difficult, if not provocative, to make invidious distinctions between groups who are deemed to be indigenous and groups that are not. . . . [I]n countries without . . . legal frameworks but with social groups regarded as deserving of protection under the directive (for example, Morocco, Ethiopia), the very use of the term "indigenous peoples" may have constrained application of the OD provisions.

Id. ¶ 2.8.

57. See André Bételle, *The Idea of Indigenous People*, 39 CURRENT ANTHROPOLOGY 187, 188-91 (1998); Benedict Kingsbury, "Indigenous Peoples" in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414, 416 (1998).

58. OPERATIONS EVALUATION DEP'T, WORLD BANK, REPORT NO. 25,754, IMPLEMENTATION OF OPERATIONAL DIRECTIVE 4.20 ON INDIGENOUS PEOPLES: AN EVALUATION OF RESULTS 13 box 2.1 (2003) [hereinafter OED EVALUATION].

59. *Id.*

60. *Id.*; see also OED DESK REVIEW, *supra* note 45, ¶ 2.8.

have suffered the same fate as the loan to Morocco. An evaluation by the OED states that “[f]or the most part,” the indigenous peoples policy has not been applied in Africa and the Middle East and, within the Europe and Central Asia region, has only been applied in Russia.⁶¹ Yet the OED notes that some of these countries’ ethnic populations should have qualified under the Bank’s own definition of “indigenous.”⁶² Thus, Bank staff tend to avoid creating political tensions with borrower governments that would impede project implementation and country negotiations.

C. *Civil Society Activism*

The level of civil society activism within borrower countries is another factor contributing to whether the Bank applies its indigenous peoples policy. Influential civil society advocates can ally with staff who are competing for control over decisionmaking within the Bank. Because heated internal deliberations often accompany controversial loans like the loan to Morocco, pressure from civil society activists can significantly influence how indigenous peoples are addressed in Bank projects.

Employees who deal with indigenous peoples and related issues (like the environment and resettlement) have historically occupied a subordinated position within the Bank.⁶³ In the words of an NGO representative, “Those Bank staff who recognize the problems facing indigenous peoples remain a small minority within the institutional structure and are often located in the less influential technical (advisory) departments rather than actually having primary responsibility for loans.”⁶⁴ Michael Cernea, the first non-economist social scientist hired by the Bank (in 1974), chronicles the increasing number of anthropologists at the Bank and their growing institutional weight, especially in the area of policy development. While he hails substantive changes in the institution’s culture spurred by a “critical mass” of social scientists, he admits that “there is still a long way to go in mainstreaming and generalizing social analysis in World Bank activities.”⁶⁵

Different perspectives on social issues have resulted in clashes over how to address the rights of indigenous peoples when they are implicated in controversial but potentially profitable development projects. In the case of

61. OED EVALUATION, *supra* note 58, ¶ 2.11.

62. OED DESK REVIEW, *supra* note 45, at 13 box 3.1.

63. For a discussion of the position of non-economist social scientists, see, for example, MICHAEL M. CERNEA, SOCIAL ORGANIZATION AND DEVELOPMENT ANTHROPOLOGY: THE 1995 MALINOWSKI AWARD LECTURE 4-8 (World Bank, Environmentally Sustainable Dev. Studies & Monographs Series, No. 6, 1996); and Jonathan Fox, *Advocacy Research and the World Bank: Propositions for Discussion*, 13 DEV. PRAC. 519, 523-24 (2003) (discussing the limited influence of anthropologists working in the Bank).

64. Andrew Gray, *Development Policy, Development Protest: The World Bank, Indigenous Peoples, and NGOs*, in THE STRUGGLE FOR ACCOUNTABILITY, *supra* note 5, at 267, 290.

65. CERNEA, *supra* note 63, at 13-14 (emphasis omitted).

the loan to Morocco, there were likely minority voices within the Bank who advocated for identifying the Berbers as indigenous and canceling the loan following Morocco's refusal to accept the indigenous peoples policy. While the Bank does not publicize internal discussions among staff that lead to loan decisions, evidence from other projects concerning indigenous peoples suggests what may have happened in the case of the loan to Morocco.

For example, during the late 1980s and early 1990s, an internal conflict arose between the Bank's energy and environment departments over the Mount Apo geothermal plant project in the Philippines.⁶⁶ The departments issued conflicting recommendations on whether the Bank should allocate funding for the Mount Apo project from an already approved Bank energy sector loan. Because Mount Apo is one of the richest botanical reserves in Southeast Asia and the ancestral home of six indigenous groups, a Bank loan to construct power plants and support oil exploration at the site raised serious indigenous rights and environmental concerns. While the energy department expressed support for the geothermal project at Mount Apo, the environment department wanted to find an alternative site for the project.⁶⁷ NGOs and local community groups capitalized on this internal division as they constructed a transnational alliance against the project.⁶⁸

Because of growing internal and external pressure, the Bank concluded in mid-1992 that the project proposal did not adequately take account of local groups or consider the cultural and religious importance of the area to indigenous peoples.⁶⁹ As a result, the Philippine government had to withdraw its request to allocate funding to the project. Why did activists allied with sympathetic Bank staff ultimately sway internal decisionmaking over this project while they likely had little influence over the one in Morocco? The answer lies in the presence of concurrent outside pressure from a transnational network of activists.

The level of civil society activism in potential borrower countries can influence how internal conflicts play out within the ranks of Bank employees. The leverage of environmentalists and anthropologists over Bank decisionmaking is often strongest when there is concurrent external pressure by NGOs that are ready to exploit these internal divisions.⁷⁰ This is more likely to occur in regions where strong civil society movements exist

66. See Antoinette G. Royo, *The Philippines: Against the People's Wishes, the Mt. Apo Story*, in *THE STRUGGLE FOR ACCOUNTABILITY*, *supra* note 5, at 151, 159.

67. *Id.* at 158-59.

68. *Id.* at 169.

69. *Id.* at 160.

70. The cancellation of Nepal's Arun III Hydroelectric Dam was in part due to "the reciprocal interaction between external critics and . . . insider advocates of environmental and social concerns within the Bank." Jonathan A. Fox & L. David Brown, *Introduction*, in *THE STRUGGLE FOR ACCOUNTABILITY*, *supra* note 5, at 1, 4. Although a number of factors generally contribute to the Bank's cancellation of a loan, the alliance between civil society critics and internal Bank dissidents can play a role.

and where local NGOs have ties to international NGOs (often based in the United States or Europe). The most politically mobilized community-based organizations and NGOs concerned with indigenous rights exist in Latin America, as compared to those in Africa and Asia.⁷¹ High levels of civil society participation can create external pressure on the Bank. This pressure strengthens the hand of Bank staff who are advocating for the application of the indigenous peoples policy, especially when governments are reluctant to institute the required protections.

Part of the reason for the discrepancy in civil society activism across geographic regions is that countries in Latin America have generally been more supportive of indigenous rights than those in other regions: Of the seventeen countries that have ratified International Labor Convention 169 (the only legally binding international instrument on indigenous and tribal peoples), thirteen are Latin American and Caribbean countries.⁷² In countries with supportive political and legal environments for indigenous rights, civil society organizations are often allowed to thrive, which enables them to exert influence over Bank decisionmaking and push the Bank toward rigorous application of the indigenous peoples policy.⁷³

According to an OED evaluation, countries in Latin America and the Caribbean adopted an approach that was highly consistent with that required by OD 4.20.⁷⁴ In contrast, even when OD 4.20 was applied to countries in Africa and the Middle East, the approach adopted to protect indigenous peoples was typically inconsistent with the approach outlined in the policy.⁷⁵ Uneven policy application across geographic regions is also apparent with respect to the Bank's involuntary resettlement policy, with the Latin America and Caribbean region receiving the highest performance rating.⁷⁶ Thus, a borrower country's political and legal climate and the level

71. See Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33, 70-78 (1994); Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 74-92 (1999).

72. International Labour Organisation: Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *adopted* June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991).

73. See Kingsbury, *supra* note 23, at 328 ("In other [borrowing] states, especially where indigenous groups are politically organized and familiar with Bank policy, the Bank is almost inevitably drawn into processes of social group self-identification and definition. . . . [T]he Bank has sometimes worked directly with indigenous political organizations where the state government accepts this.").

74. OED EVALUATION, *supra* note 58, ¶ 2.16.

75. *Id.* ¶ 2.18.

76. A 1994 Bank report documented disparities across regions in the amount of Bank supervision in projects over the implementation of resettlement plans. It found that Bank task managers in Latin America and the Caribbean supervised on a regular basis, with 100% of projects supervised at least once per year. In contrast, the amount of supervision for resettlement projects in other regions was less regular or intermittent—68% of projects in South Asia, 50% in Europe and Central Asia, 47% in Africa, 42% in East Asia and the Pacific, and 33% in the Middle East and North Africa. ENV'T. DEP'T, WORLD BANK, PAPER NO. 032, RESETTLEMENT AND

of civil society activism may facilitate the effective operationalizing of indigenous rights norms.

III. INDIGENOUS RIGHTS NORM COMPLIANCE

Conventional scholarship on norms emphasizes the way international institutions like the World Bank pressure states to comply with international norms.⁷⁷ Yet this focus fails to explain the fluid role played by the Bank in norm compliance—i.e., how domestic actors may exert pressure on the Bank to neglect or even violate its own norms. Rather than serving as the agent of influence over borrower countries with respect to indigenous rights norms, the Bank can sometimes serve as the object of influence and, as a result, appear to be a mere follower in the process of norm compliance. This occurs in situations where state governments have a strong power base and refuse to implement Bank standards that are inconsistent with their less rigorous national safeguard systems. In Part II, I demonstrated that implementation of Bank policies may be influenced by domestic political and legal constraints and levels of civil society activism. In this Part, I explain what this phenomenon indicates about the institution's fluid role in the transnational legal process. I then propose a strategy for promoting indigenous rights norm internalization within borrower countries and the Bank itself.

A. *Rethinking the Dynamics of Norm Emergence and Internalization*

This study of the World Bank and its indigenous peoples policy can help us understand how theories of norm compliance, particularly transnational legal process theory, can be applied in practice.⁷⁸ Transnational legal process theory aims to explain how “interlinked rules of domestic and international law develop, and [how] interlinked processes of domestic and international compliance come about.”⁷⁹ It derives from the international legal process school, whose proponents included Abram Chayes and Antonia Handler Chayes, Thomas Ehrlich, and Andreas Lowenfeld.⁸⁰ International legal process scholars were interested in how

DEVELOPMENT: THE BANKWIDE REVIEW OF PROJECTS INVOLVING INVOLUNTARY RESETTLEMENT 1986-1993, at 154-56 & tbl.6.1 (1996).

77. See, e.g., Finnemore & Sikkink, *supra* note 8.

78. See Koh, *Why Obey?*, *supra* note 7.

79. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 56 (2004).

80. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); 1-2 ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, *INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE* (1968); THOMAS EHRLICH & MARY ELLEN O'CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE* (1993).

law works in international society and how international rules are incorporated in political decisionmaking. Transnational legal process theory extends this inquiry into a study of the relationship between international norms and domestic legal processes in an attempt to answer the question of why nations obey international law.

The theory outlines three phases: interaction, interpretation, and internalization. What I refer to as norm emergence corresponds to the interaction phase. According to the theory's most vocal proponent, Harold Koh,

One or more transnational actors provokes an *interaction* (or series of interactions) with another, which forces an *interpretation* or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to *internalize* the new interpretation of the international norm into the other party's internal normative system.⁸¹

This process is catalyzed by "transnational norm entrepreneurs" (i.e., nongovernmental actors, both individuals and organizations) and transnational issue networks, which advocate for the adoption and diffusion of new norms.⁸² The key factor in the transnational legal process is repeated participation, which "helps to reconstitute national interests, to establish the identity of actors as ones who obey the law, and to develop the norms that become part of the fabric of emerging international society."⁸³

While norm emergence and internalization are critical moments in the transnational legal process, the dynamics of these stages have been insufficiently elucidated in previous literature.⁸⁴ I have shown that in the interaction (or emergence) stage, external actors can exploit tensions within an international institution and play the institution against itself. Furthermore, in the internalization stage, governments both influence and are influenced by the World Bank. Thus, one must supplement the conventional model of transnational legal process theory with a more nuanced version.

A conventional version of transnational legal process theory as applied to the Bank and indigenous rights norms would proceed as follows: First, norm entrepreneurs and transgovernmental advocacy networks trigger interactions with the Bank and put indigenous rights considerations on its agenda. Second, the Bank interprets its mandate and Articles of Agreement

81. Koh, *Why Obey?*, *supra* note 7, at 2646.

82. Koh, *Bringing International Law Home*, *supra* note 7, at 647, 649. For a discussion of issue networks, see KECK & SIKKINK, *supra* note 8.

83. Koh, *Why Obey?*, *supra* note 7, at 2655.

84. See David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW. U. L. REV. 879, 881 (2003) ("Transnational legal process theory fails to explain how human rights principles become internalized domestically.").

to allow for the recognition of indigenous rights norms, particularly through the adoption of an indigenous peoples policy. Third, the Bank implements its policy in borrower countries and provokes the internalization of indigenous rights norms into domestic law. In this manner, international norms win approval and lead to domestic compliance.

Here is the more nuanced version of transnational legal process theory that I propose: First, norm entrepreneurs and transgovernmental advocacy networks trigger interactions with the Bank. *Concurrently, advocates within the Bank pressure it to adopt reforms. Resulting alliances between internal and external advocates create a dialogue over how to balance indigenous rights and development goals.* The advocates succeed in putting indigenous rights considerations on the institution's agenda. Second, the Bank interprets its mandate and Articles of Agreement to allow for the recognition of indigenous rights norms, particularly through the adoption of an indigenous peoples policy. Third, the Bank *attempts to* implement its policy in borrower countries and provoke the internalization of indigenous rights norms into domestic law. *Aided by civil society activists, it sometimes must overcome domestic legal and political constraints, which threaten to reverse the process of norm internalization by pressuring the Bank itself not to comply with its own norms.*

This version, particularly its account of the interaction and norm internalization stages, is substantiated by the Bank's historical progression toward adopting human-rights-related reforms, including norms on indigenous peoples' rights. First, I discuss the interaction phase. In the 1980s and early 1990s, human rights NGOs and indigenous peoples pressured the Bank to adopt an operational policy in accordance with indigenous rights norms being formulated in a variety of public international legal forums.⁸⁵ Disaffected Bank employees, often anthropologists and sociologists who felt that their voices were being ignored in Bank decisionmaking, supported the campaign of external advocates. These internal reformers increased pressure on management to

85. Customary international law on the rights of indigenous peoples has been slowly emerging over the past two decades as part of a growing international movement for indigenous rights. See, e.g., S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 61-72 (2d ed. 2004) (tracing the emergence of norms of customary international law on indigenous peoples from early activity at the United Nations in the 1970s to the writing of the U.N. Draft Declaration on the Rights of Indigenous Peoples in 1994 and the case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001), before the Inter-American Court of Human Rights in 2001). The global process of indigenous standard setting is taking place in a variety of forums, including the International Labour Organization, the United Nations, and the Organization of American States. See International Labour Organisation, *supra* note 72; U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, Working Group on Indigenous Populations, *Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (Aug. 26, 1994); Proposed American Declaration on the Rights of Indigenous Peoples, Inter-Am. C.H.R., OEA/Ser.L/V/II.95, doc. 7 rev. 625 (1997), available at <http://www.cidh.org/annualrep/96eng/chap.4.htm>.

place more emphasis on other noneconomic concerns such as civil society participation, the environment, and the displacement of vulnerable populations.⁸⁶ For example, Bank social scientists employed NGO pressure to urge the Bank to develop a formal policy on involuntary resettlement in 1980.⁸⁷ This evidence suggests the contested nature of decisionmaking within the Bank, which allowed for a dialogic process of norm emergence between internal and external actors.

Once its indigenous peoples policy was adopted, the Bank began to apply the policy to borrower countries to encourage them to internalize indigenous rights norms. These countries often embrace such norms in order to enhance their reputation in the international community and secure loans from the Bank. But additional evidence demonstrates that this is not always the case: Norm internalization may depart from the conventional model in cases where the Bank faces domestic political and legal constraints when attempting to influence countries to internalize these norms.

When countries express an unwillingness to comply with the indigenous peoples policy, the Bank may be induced not to apply the policy, unless it faces enough civil society pressure. Institutional incentives further motivate employees to approve loans to these countries. As a result, the Bank ends up not implementing its own norms. By not applying its policy in situations when it should, it becomes a norm breaker.⁸⁸ In other words, while international organizations like the Bank often act as agents of norm internalization in countries, they may sometimes become the *objects* of reverse norm internalization. The Bank's failure to comply with its own norms threatens to undermine its attempts to achieve norm compliance in borrower countries.

B. *A Two-Pronged Strategy for Norm Internalization*

Why has the World Bank's participation in the transnational legal process not translated into consistently effective implementation of its indigenous peoples policy in borrower countries? In following the

86. See Jonathan A. Fox, *When Does Reform Policy Influence Practice? Lessons from the Bankwide Resettlement Review*, in *THE STRUGGLE FOR ACCOUNTABILITY*, *supra* note 5, at 303, 334 ("Although dealing with NGO critics can provoke ideological and professional dissonance, insider reformists are nevertheless well aware that advocacy groups create an enabling environment that bolsters their own leverage.").

87. The involuntary resettlement policy was amended in 1986 and 1990 and made public in 1988. *Id.* at 308.

88. Whether the Bank is prompted to grant loans to countries that violate, or at least disregard, certain norms may depend on how much value the Bank places on these norms as opposed to others. Does the Bank's underperformance in implementing its indigenous peoples policy suggest that indigenous rights is not a norm of high value? The question of which norms matter under what conditions is beyond the scope of this Note but is worthy of further research.

normative approach of the new international legal process school,⁸⁹ I offer a strategy for increasing internalization of indigenous rights norms within both the Bank and borrower countries. While I primarily address these proposals to indigenous rights advocates, Bank staff would also benefit from heeding the advice on institutional reform. My prescription for domestic internalization is not particularly new, but advocates have underemphasized this strategy in favor of focusing on internalization within the Bank.

I argue that advocates and Bank staff must invest resources in promoting internalization within borrower countries. Martha Nussbaum astutely observes that “the implementation of such principles must be left, for the most part, to the internal politics of the nation in question, although international agencies and other governments are justified in using persuasion—and in especially grave cases economic or political sanctions—to promote such developments.”⁹⁰ In other words, an implementation strategy cannot be effective if it bypasses the state.

In their communications with the Bank, indigenous rights NGOs have primarily focused on provoking meaningful interactions with Bank management and attempting to generate a favorable interpretation of norms. However, they have failed to devote enough efforts to the third and critical step toward obedience under the transnational legal process theory—norm internalization. In order to promote compliance with indigenous rights norms, advocates must encourage internalization in both the Bank and its borrower countries. Because a borrower country’s political position with respect to indigenous peoples influences the Bank’s application of its policies, I argue for a two-pronged strategy that addresses internalization within both entities.

Internalizing indigenous rights norms in the culture of the Bank means incorporating the norms into its identity. The adoption of an indigenous peoples policy in 1992 represented a first step toward political internalization within the institution—i.e., when the Bank “elite” accepted indigenous rights norms and adopted them as a matter of policy.⁹¹ However, this moment of norm enunciation has not led to a pull toward obedience within the lower ranks of the Bank hierarchy. Political internalization within the institution has not been sufficient. What is missing is social internalization, “when a norm acquires so much public legitimacy that there is widespread general obedience to it.”⁹²

89. See Mary Ellen O’Connell, *New International Legal Process*, 93 AM. J. INT’L L. 334, 337-39 (1999).

90. MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 105 (2000).

91. Koh, *Why Obey?*, *supra* note 7, at 2656-57.

92. *Id.* at 2656.

Social internalization in the Bank would mean that employees interpreted indigenous rights promotion as an essential part of the institution's mandate of poverty reduction. In economic terms, indigenous rights would be recognized as a global public good. Because indigenous peoples are among the poorest and most excluded populations in many countries, promoting their development through culturally compatible programs would facilitate significant improvements in countries' overall economic situations. In order to further social internalization, NGOs must focus on promoting a favorable interpretation of the Bank's Articles of Agreement, which state that the Bank "shall not interfere in the political affairs of any member" and that "[o]nly economic considerations shall be relevant to their decisions."⁹³ A favorable interpretation of the Articles would define indigenous rights as not only a political issue but also one with indirect economic implications.

Social internalization would also require that the Bank address constraints arising from the institution's staff-incentive structure. Employees have a financial disincentive to apply the indigenous peoples policy, which reflects an institutional bias toward time efficiency and effective resource management: They are rewarded for getting the most money out the door and carrying out the largest number of loans.⁹⁴ Applying the policy would mean devoting additional resources to institute culturally compatible measures (such as indigenous peoples development plans based on data gathered from anthropological studies conducted by the Bank) and negotiating with countries that lacked the political will to comply.⁹⁵ Some managers, therefore, view the protection of indigenous rights as an onerous requirement that stifles their efforts to efficiently process loans. According to a staff survey conducted by the Bank's Operations Evaluation Department, "[T]here is a perception among respondents that task teams do not have adequate resources to implement the OD."⁹⁶ Among the respondent comments was the following statement: "[T]o work in areas with [indigenous peoples] a TTL [task team leader] is

93. Articles of Agreement, *supra* note 12, art. IV, § 10, 60 Stat. at 1449, 2 U.N.T.S. at 158.

94. Financial concerns also influence the level of compliance with the Bank's environmental assessment policy. Because full compliance is seen as unreasonably expensive by some borrower countries and Bank management, "[l]oans go through more smoothly when compliance is not questioned, satisfying the Bank's financiers and getting borrowers the money they need more quickly." Natalie Laura Bridgeman, Note, *World Bank Reform in the "Post-Policy" Era*, 13 GEO. INT'L ENVTL. L. REV. 1013, 1025 (2001).

95. An indigenous peoples development plan includes an assessment of the country's legal framework as it relates to indigenous peoples, baseline data including up-to-date maps and an analysis of the peoples' social structure and production activities, assistance with the country's recognition of traditional land tenure systems, and a strategy for local participation. Although the indigenous peoples development plan is the borrower country's responsibility under OD 4.20, preparation, appraisal, implementation, and supervision of the plan require significant involvement and technical assistance by Bank staff. 2 OPERATIONAL MANUAL, *supra* note 15, OD 4.20, ¶¶ 15-19 (Indigenous Peoples).

96. OED DESK REVIEW, *supra* note 45, ¶ 4.8.

forced to prepare long descriptive studies, often of no substantial utility in project design. A TTL thus has an incentive not to involve these areas.”⁹⁷

The incentive to get the most money out the door means that managers refrain from enforcing required provisions that may delay the progress of a loan and increase its expense. Preparing indigenous peoples development plans and conducting meaningful consultations with indigenous peoples are two such requirements. Task managers have

a strong incentive to make the loan ‘work[,]’ . . . partly because their own success depends on effectively managing aid disbursements and partly because punishments imposed by the Bank for failing to meet Bank conditions lack moral legitimacy. The threat not to make subsequent [loan disbursements] available therefore has relatively low credibility, and the Bank learns to accept partial success.⁹⁸

The pressure to lend money was cited in the Bank’s 1992 Wapenhans Report, which studied the effectiveness of its lending operations.⁹⁹ According to this report, the key reason for the Bank’s decreasing portfolio quality in 1992 was pervasive appraisal optimism and the “loan approval culture” that motivates staff to give more attention to the quantity of lending than to its quality.¹⁰⁰ It is imperative that the Bank address these institutional obstacles, which are impeding social internalization of indigenous rights norms.

As the second prong of a strategy to implement its indigenous rights policy, the Bank should facilitate the internalization of indigenous rights norms in borrower countries. Bank managers should engage in direct dialogue with country governments over indigenous issues during short- and long-term project planning and invest additional resources in building the capacity of indigenous organizations. Countries must recognize that the protection of indigenous rights serves their national interests because indigenous peoples often comprise the poorest and most vulnerable segment of their populations. Although domestic policies that recognize indigenous rights and provide culturally appropriate protections may provoke political or ethnic tensions within countries (because of the implication of differential treatment among citizens and possible historical factors), such

97. *Id.* at 26 box 4.2. In addition, domestic political obstacles faced by teams that are preparing indigenous peoples development plans “ha[ve] led to inefficiencies in the application of the OD.” *Id.* ¶ 4.9.

98. Christopher Gilbert et al., *Positioning the World Bank*, 109 *ECON. J.* F598, F617 (1999).

99. WAPENHANS REPORT, *supra* note 19; see also Deborah Moore & Leonard Sklar, *Reforming the World Bank’s Lending for Water*, in *THE STRUGGLE FOR ACCOUNTABILITY*, *supra* note 5, at 353, 386; Bridgeman, *supra* note 94.

100. WAPENHANS REPORT, *supra* note 19, at 14.

policies are a necessary step toward the alleviation of high national poverty rates.

Bank field staff should also address the domestic policy, institutional, and legal frameworks for indigenous peoples when they prepare a country assistance strategy (CAS), which presents the Bank's development plan for a borrower country.¹⁰¹ Including an indigenous peoples development plan on a countrywide scale, for example, in contrast to the standard project-specific plans, would be consistent with one of the purposes of a CAS: to provide "an assessment of . . . any governance issues related to the government's willingness and capacity to carry out needed reforms."¹⁰² The plan would address long-term domestic legal and political reforms that would facilitate the application of the Bank's indigenous peoples policy. In addition, for all projects that may affect indigenous peoples, Bank staff should work directly with community organizations and include them not only in the design but also in the implementation, monitoring, and evaluation of projects.¹⁰³ Working directly with communities would build civil society support and thereby strengthen the Bank's efforts to achieve norm internalization in domestic legal and political systems.

Collaboration with other financial institutions would also increase the Bank's leverage in its discussions with borrower countries and would promote a consistent approach to indigenous rights. Like the Bank, many of these institutions must also negotiate between competing economic and political interests when they address the situation of indigenous peoples. Such institutions range from regional development banks (e.g., the Asian Development Bank, the Inter-American Development Bank, and the African Development Bank) to multinational corporations (e.g., Royal Dutch/Shell, WMC Resources Ltd.), many of which are in the process of developing their own policies on indigenous peoples.¹⁰⁴ If financial

101. The World Bank normally develops a CAS every one to three years in consultation with the borrower country's government and civil society organizations. This strategy addresses the country's top development priorities, creditworthiness, and past portfolio performance and the level of financial and technical assistance that the Bank seeks to provide the country.

102. 1 OPERATIONAL MANUAL, *supra* note 15, BP 2.11 Annex A, ¶ 7 (Content of a Country Assistance Strategy Document).

103. The Bank has adopted this approach in a limited number of projects. Its Latin America and Caribbean region has implemented a participatory monitoring and evaluation system for several pilot "community-driven development projects" affecting indigenous peoples, particularly in Brazil. These projects aim to give more control over decisions and resources to community groups. However, other regions have yet to fully operationalize this approach in all of their projects.

104. The Inter-American Development Bank is currently preparing a policy on indigenous peoples that will likely borrow from that of the World Bank. In addition, many multinational corporations have recently developed codes of conduct that address the protection of indigenous peoples. For example, since 1998 WMC Resources Ltd. has required prospective contractors to declare an intention to develop a local community or indigenous peoples plan. The company's "indigenous policy" highlights its commitment to respecting human rights, cultural diversity, and heritage. See WMC Res. Ltd., Sustainability, <http://www.wmc.com/sustainability> (last visited Apr. 28, 2005).

institutions cooperate and harmonize their policies on indigenous peoples, countries will be pressured to comply with indigenous rights norms because they will have no alternative funding source.

CONCLUSION

Many critiques of the World Bank incorrectly assume that the Bank is an institution with uniform interests and a single voice, represented by official policies and documents. In analyses of the Bank's implementation of its safeguard policies, NGOs rarely recognize the multiplicity of perspectives within the institution. Some advocates, for example, may have analyzed the aforementioned decision to grant a loan to Morocco as an indication that the Bank is not committed to indigenous rights. This view would only present a partial picture of what is actually going on inside the organization.

I have demonstrated in this Note that there are alternative opinions within the Bank, such as those of environmentalists and anthropologists, who may be deeply committed to the protection of indigenous rights but who must struggle for influence over Bank decisionmaking. Misrepresentations of the Bank by indigenous rights advocates threaten to derail potential cooperation between the Bank and NGOs to achieve norm internalization in countries. In the long term, advocates may alienate their allies at the institution and hinder the interests of those they represent. When advocates recognize internal power struggles, they can cooperate with sympathetic employees to promote their cause.

Given conflicts within the organizational culture of the Bank, ethnographic fieldwork is necessary to illuminate internal decisionmaking regarding the institution's approach to human rights. By interviewing Bank staff, tracking the loan approval cycle, and observing consultation meetings with civil society organizations, one could uncover the Bank's hidden internal operations. This fieldwork would promote meaningful interactions and partnerships between the institution, advocates, and indigenous peoples who are historically underrepresented in development decisions affecting them. It would also offer lessons for how other international economic organizations, such as the World Trade Organization, can incorporate human rights norms in their operations.

Such a study would contribute to a growing body of literature on the anthropology of institutions, including the nature and shape of bureaucratic power, the conditions that propel changes in organizational ideologies, and the production and circulation of rights-based normative discourses within

organizational cultures.¹⁰⁵ Because international law is complicated by soft enforcement mechanisms and transnational relations of power, it is particularly important to study international institutions ethnographically and disaggregate the multiple actors working within them. Recognition of internal contestations would shed further light on contradictions inherent in human rights culture and illuminate how transformation occurs from within institutions. The World Bank's approach to indigenous rights is but one case study of this broader theme. Understanding how the line between economic and political issues is drawn both inside and outside the Bank reveals how seemingly depoliticized power is exerted by an institution that is itself the product of competing internal interests.

105. See, e.g., JAMES FERGUSON, *THE ANTI-POLITICS MACHINE: "DEVELOPMENT," DEPOLITICIZATION, AND BUREAUCRATIC POWER IN LESOTHO* (1994); HUGH GUSTERSON, *NUCLEAR RITES: A WEAPONS LABORATORY AT THE END OF THE COLD WAR* (1996); MICHAEL HERZFELD, *THE SOCIAL PRODUCTION OF INDIFFERENCE: EXPLORING THE SYMBOLIC ROOTS OF WESTERN BUREAUCRACY* (1992).